IN THE

MICHAEL RODAK, JR.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1476

UNITED STATES OF AMERICA,
Petitioner,

v.

THEODORE SMYRNAS
JOSEPH AMERIGO BELLOSI
JAMES P. DiNENNA, SR.
THELMA AGNES DiNENNA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

MEMORANDUM FOR THEODORE SMYRNAS, JOSEPH AMERIGO BELLOSI, JAMES P. DiNENNA, SR., and THELMA AGNES DiNENNA IN OPPOSITION

H. CLIFFORD ALLDER
Suite 1001
666 Eleventh Street, N.W.
Washington, D.C. 20001

Attorney for Theodore Smyrnas, et al.

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The trial Court in the United States District Court for the District of Columbia granted the defendants motion to suppress and the government appealed to the United States Court of Appeals for the District of Columbia Circuit which unanimously affirmed the trial Court.

The trial court on March 29, 1972, filed a "MEMORANDUM and ORDER", which it is submitted, con-

tained a correct statement of the pertinent facts in the cases and is as follows:

> "The application for a court order was in each case presented by Donald Campbell of the Department of Justice and in each application it was recited:
>
> "Pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable John N. Mitchell, has specially designated in this proceeding the Assistant Attorney General of the Criminal Division of the Department of Justice, the Honorable Will Wilson, to authorize affiant to make this application for an extension of an order authorizing the interception of wire communication."

Notwithstanding the foregoing representation, the record indicates as to Intercept 1(a), *supra*, that the original authorization for such intercept was not signed or initialed by the Attorney General but by one Sol Lindenbaum, his Executive Assistant. Lindenbaum in turn addressed a memorandum to Will Wilson, the Assistant Attorney General in Charge of the Criminal Division, reciting that Wilson was "specially designated" to authorize an application to the Court for the intercept order. However, Harold Shapiro, the Deputy Assistant Attorney General in the Criminal Division, and not Will Wilson, affixed Wilson's signature to an authorization to Donald Campbell to make the application to the Court.

The same procedure was followed as to intercepts 1(b) and 3, *supra*, except that Henry Peterson, a Deputy Assistant Attorney General in the Criminal Division, affixed Will Wilson's signature to the authorization to Donald Campbell to make application to the Court for the intercept order. In other words, the application was

processed through Lindenbaum to Peterson to Campbell and neither the Attorney General nor a specially designated Assistant Attorney General ever handled the papers.

As to Intercept No. 2, *supra*, John N. Mitchell, then Attorney General, did in fact initial a memorandum to Will Wilson specially designating Wilson to exercise his powers to authorize application to the Court. However, Henry Peterson and not Will Wilson affixed Wilson's signature to the authorization to Campbell to apply to the Court for its order."

These defendants, Theodore Smyrnas, Joseph Amerigo Bellosi, James R. DiNenna, Sr., and Thelma Agnes DiNenna, respectfully submit that the analysis of these matters made by the trial judge in this case, as shown in his "MEMORANDUM and ORDER" of March 29, 1972, covers the matter completely and demonstrates the complete accuracy of the Court's findings. The pertinent part of that are as follows:

> "Having examined the affidavits filed by the government, and after hearing oral argument, the Court concludes that the procedures followed in authorizing intercepts 1(a), 1(b) and 3 clearly violated the terms of 18 U.S.C. §2516(1); and the Court further determines that all evidence derived from the illegal intercepts must be suppressed under 18 U.S.C. §2518(10).
>
> "In so ruling, the Court adopts the reasoning and conclusions of the Fifth Circuit in United States v. Robinson, 468 F.2d 189, in which the Fifth Circuit was faced with the identical question we face here. After an examination in depth of the legislative history of Section 2516(1), the Court concluded that the procedures followed severely undercut the congressional purpose in fixing responsibility for the authorization of intercepts in 'a publicly responsible

official subject to the political process.' "

Several federal district courts have relied on *Robinson* to suppress evidence secured through intercepts which were subject to the same procedural defect in the authorization process as that involved here. *United States v. Cihal*, 336 F. Supp. 261; *United States v. Focarile*, 340 F. Supp. 1033; *United States v. Aquino*, 338 F. Supp. 1080. *Aquino* extended *Robinson* one step and held that the authorization for the extension of a properly authorized intercept must also be free of the procedural defect struck down in *Robinson*.

As to Intercept No. 2

The Court finds that the Attorney General personally approved the authorization of Intercept No. 2 in a memo initialed by him, addressed to Will Wilson, and, therefore, concludes that there was substantial compliance with the statute notwithstanding that Will Wilson did not sign personally.

Nonetheless, the Court concludes that the evidence secured from this intercept must be suppressed under the "fruit of the poisonous tree" doctrine since the affidavit in support of the application for this intercept is based almost entirely upon information obtained from intercepts 1(a) and 1(b) which this Court has found to be in violation of 18 U.S.C. §2516(1). *United States v. Iannelli*, 339 F. Supp. 171.

Congress in protecting the rights of citizens to privacy, deliberately and carefully set out the *exact* way applications had to be done. Errors in the authorization procedure can not be termed merely technical and so called substantial compliance by the "alter ego" of the United States Attorney is not sufficient.

Justice Powell in *United States v. United States District Court*, 32 L.Ed.2d 752, decided June 19, 1972,

said "Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§2510-2520, authorizes the use of electronic surveillance for classes of crimes carefully specified in 18 U.S.C. §2516. Such surveillance is subject to prior court order. Section 2518 sets forth the detailed and particularized application necessary to obtain such an order as well as carefully circumscribed conditions for its use. The Act represents a comprehensive attempt by Congress to promote more effective control of crime while protecting the privacy of individual thought and expression. Much of Title III was drawn to meet the constitutional requirements for electronic surveillance enunciated by this Court in *Berger v. New York*, 388 U.S. 41, 18 L.Ed.2d 1040, 87 S.Ct. 1873 (1967), and *Katz v. United States*, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967)."

These appellees are familiar with other points being made by counsel for the other defendants and join with them in each of the points without prolonging this memorandum with repetition.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

H. CLIFFORD ALLDER
Suite 1001
666 Eleventh Street, N.W.
Washington, D.C. 20001

Attorney for Theodore Smyrnas, et al.